

State of Nebraska

Accountability and Disclosure Commission

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ADVISORY OPINION #205

SUBJECT: Conflicts of Interest/ Political Subdivisions/Effects of actions on the public generally or a broad segment of the public

Requested by: Michael C. Klein, Attorney with Anderson, Klein, Brewster & Brandt, representing The Central Nebraska Public Power and Irrigation District (hereinafter, "Central")

Questions Presented: "1. May all Central Nebraska Public Power and Irrigation District Board Members properly vote on all issues and actively participate in discussions among Board Members and staff relative to Central's standard form leases and the standard form water service agreements?"

"2. Are actions and decisions by Central Board Members affecting the standard form residential leases and standard form water service agreements, distinguishable from the effects of such actions on the public generally or a broad segment of the public?"

Conclusion: 1. The answer to the first question is "No." Not all Central Board Members may participate and vote on matters relating to standard form leases and standard form water service agreements. Board Members who are also lessees of the District may not participate or vote on the standard form leases because they may have a financial benefit or detriment as a consequence of the agreements. Similarly, Board Members who are also irrigators within the District, may not participate or vote on the standard form water service agreements because they may have a financial benefit or detriment as a consequence of such agreements.

2. The answer to the second question is: "Yes." Actions and decisions of Central's Board Members affecting the standard form residential lease agreements and the standard form water service agreements are distinguishable from the effects of such actions on the public generally or a broad segment of the public.

Scope of this Opinion: This Advisory Opinion of the Nebraska Accountability and Disclosure Commission ("NADC") is limited in scope to the precise questions presented by the Requester, as stated above. It is further limited by the jurisdiction of the NADC in its administration of the Nebraska Political Accountability and Disclosure Act ("NPADA"), 49-1401, et. seq., Nebraska Revised Statutes.

In particular, this Opinion hereby notes, but does not reach conclusions with respect to Section 70-642.02 of the Nebraska Revised Statutes (Reissue 2018), and the Board's By-Laws at Article II, Section 6, which incorporate that Section into the By-Laws. This Statute is outside the scope of the NPADA. Both the Statute and the cited Section of the By-Laws state, in part, the following:

"No member of the Board of Directors shall be interested, directly or indirectly, in any contract to which the District, or any one for its benefit, is a party.."

The rationale for this Statute appears to be that persons in contract with Central may have a conflict of interest in serving on the Board. While this section falls outside the jurisdiction of this Commission, the rationale for this section may provide guidance in responding to the subject questions.

Facts: We summarize the facts which are material to this opinion as follows:

- (a) Central's purpose and number of leaseholders/irrigators.** Central is a public corporation and political subdivision of Nebraska, organized and existing pursuant to Neb. Rev. Stat. Sections 70-601, et seq. (Reissue 2018). Central owns and operates a system of reservoirs, hydroplants, canals and laterals for purposes of hydro-power production, delivery of irrigation water, recreation, groundwater recharge and environmental enhancement.

Central is the largest irrigation district in Nebraska, providing irrigation water to over 107,000 acres.

Central leases portions of its real estate, located in Keith, Lincoln, Dawson and Gosper Counties to approximately 1116 tenants, who own residential structures on said leased real estate. These tenants lease property adjacent to Lake McConaughy, Jeffrey Lake, Plum Creek Reservoir, Little Knapple Lake, Midway Lake, Lakeview Acres, Johnson Lake, and Merriwether.

Central charges for the delivery of irrigation water within its District to approximately 700 customers, located in Lincoln, Dawson, Gosper, Phelps and Kearney Counties.

- (b) Composition of Central's Board, including Board members with lease or water service agreements.** Central's Board is comprised of twelve (12) elected members, including one member each from Keith, Lincoln, and Dawson Counties, and three members each from Gosper, Phelps, and Kearney Counties.

Central's Board currently includes two (2) Board members who are owners of residential structures at Johnson Lake, and they are among Central's lessees at that Lake.

Central's Board currently includes six (6) Board members who contract with Central for the service of delivery of irrigation water.

- (c) Standard Form Lease Agreements.** Central's Board has typically voted on approval of a separate standard form residential lease agreement for each of the lakes/reservoirs. As the first question, above, suggests, standard form leases are discussed and may be altered from time to time by the Board. With the exception of the rates, the standard form leases for each of Central's lake properties are similar, and, in some cases, virtually identical.

The range of leasehold rates for each of the lakes is set by Central's Board. The lease rates and area improvement fees vary from lake to lake, and each lake property may have a range of rates, depending upon location and size of the leaseholds at that lake. The

Board also sets an annual area improvement fee for each property. Currently, the standard form lease provides for a term of thirty (30) years for Lake McConaughy, Johnson Lake and Plum Creek Lakes.

After the standard form leases have been prepared and approved by the Board, individual lease agreements, which vary according to the location and size of the leasehold, are prepared and executed with each of the tenants

The exceptions to the standard form leases are the Board's properties at Jeffrey Lake and Midway Lake. At Jeffrey Lake, Central has a long-term lease with Jeffrey Lake Development, Incorporated. At Midway Lake the Board has a long-term lease with the cabin owners' association. Consequently, Central does not have direct lease agreements with residents at either Jeffrey or Midway Lakes. It should also be added that none of Central's Board Members currently lease properties at either Jeffrey Lake or Midway Lake. Questions relating to Central's relationship with Jeffrey Lake Development, Incorporated, and the cabin owners' association at Midway Lake, fall outside the scope of this Opinion.

- (d) **Standard form water service agreements.** Central has prepared and adopted a standard form water service agreement for all the irrigators served by Central. The agreement is discussed and updated by the Board as it deems necessary. Unlike the standard form lease agreement for tenants, the standard form water service agreement does not vary by geographic location, nor does the rate for the service of delivery of irrigation water (measured in acre feet) vary—there is one rate for all irrigators. After the preparation of a standard form agreement, individual agreements, based upon the standard form agreement, are then prepared and signed.
- (e) **Process of setting rates for irrigated water.** The rate charged for the service of delivery of irrigation water is uniform throughout the District. The rate is set each year, and begins with a staff recommendation concerning the amount to be charged. This recommendation is then discussed and set by the Board. The holders of water service agreements are then notified annually of the new rate.
- (f) **Board Member abstention with respect to individual agreements.** With respect to individual residential leases and the pricing of said leases, where an individual Board Member or immediate family member of that Board Member is a lessee, that Board Member has uniformly abstained from voting on approval of the individual residential lease affecting that Board Member.

Similarly, with respect to individual water service agreements, where an individual Board Member or immediate family member of that Board Member is an irrigator, that Board member has uniformly abstained from voting on approval of the individual water service agreement affecting that Board Member.

- (g) **Population of Counties in which Central leases property or provides irrigated water.** Central leases its lake properties in four different counties, whose 2017 population is indicated as follows, after each named county: Lincoln (35,280); Dawson (23,709); Gosper (2,028); and Keith (8,072). The total population of these four counties in 2017 was 69,089.

Central delivers irrigation water in five counties, whose 2017 population is indicated as follows, after each named county: Dawson (23,709); Gosper (2,028); Kearney (6,530);

Lincoln (35,280); and Phelps (9,060). The total population of these counties in 2017 was 76,607.

Analysis Concerning Question 1: Question 1 asks whether all Central Board Members may participate in discussions and voting with respect to standard form leases and irrigation agreements.

In addressing that question, the applicable provision of the NPADA is Section 49-1499.03(1). That Section provides in part as follows:

“49-1499.03. Political subdivision personnel...discharge of official duties; potential conflict; actions required.. (1)(a) An official of a political subdivision designated in section 49-1493 who would be required to take any action or make any decision in the discharge of his or her official duties that may cause financial benefit or detriment to him or her, a member of his or her immediate family, or a business with which he or she is associated, which is distinguishable from the effects of such action on the public generally or a broad segment of the public, shall take the following actions as soon as he or she is aware of such potential conflict or should reasonably be aware of such potential conflict, whichever is sooner:

- (i) Prepare a written statement describing the matter requiring action or decision and the nature of the potential conflict; and
- (ii) Deliver a copy of the statement to the commission and to the person in charge of keeping records for the political subdivision who shall enter the statement onto the public records of the subdivision.”

In applying the foregoing Statute to the facts of this case and the questions presented by the Requester, we first note that the Board members are included under the definition and designation of Section 49-1493, subsection 6, which includes, “(6) A member of the board of directors or an officer of a district organized under the provisions of Chapter 70.” As noted in the Facts, above, Central is a political subdivision formed under the provisions of Chapter 70 of the Nebraska Revised Statutes. The Board Members are therefore, “officials of a political subdivision designated in Section 49-1493,” and they are subject to the terms of Section 49-1499.03(1) of the NPADA, as stated above.

As further noted above, the Requester’s first question asks whether all Board Members may discuss and vote upon matters concerning the standard form leases as well as the standard form water service agreements. Based upon the foregoing Facts, we note that at the present time, there are two (2) Board Members who have residential leases with the District, and six (6) Board Members who have individual water service agreements with the District. We will refer to these Board Members as the “Board Members with contracts,” and this would include those Board Members with either existing or prospective leases or water service agreements with the District.

The first question relates solely to Board Members of Central, and we have no information to suggest that there are immediate family members who are lessees or who have water service agreements. Nor do we have any such information with respect to any business association of a Central Board Member. In the absence of such information, issues relating to immediate family members or business associations would be speculative, and they are not addressed in this opinion.

We see no impediment to those Board Members who do not have contracts with the District to discuss and vote upon both the standard form lease agreements and the standard form water service agreements.

However, with respect to those Board Members with contracts, the standard form agreements include certain provisions whose adoption, variance, or rejection may cause financial benefit or detriment to them.

With respect to those Board Members who have leases, the standard form lease has provisions which may cause financial benefit or detriment to them. For example, matters such as lease rates, area improvement fees, and term of leases, are matters in which Board Members with leasehold contracts may have a direct financial interest. Therefore, Board Members who have leasehold contracts with the District should not participate or vote on standard form lease agreements.

With respect to those Board Members who have water service agreements with the District, the standard form water service agreement has provisions which may cause financial benefit or detriment to them, such as the annual setting of the price for the service of delivery of an acre foot of water, which may cause financial gain or detriment to the Board members with individual water service agreements. Therefore, Board Members with water service agreements with the District should not participate or vote on standard form water service agreements.

Although the Board Members with contracts apparently uniformly abstain from voting to approve their own individual leases or water service agreements, those individual agreements reflect terms and conditions which have already been set at the time of discussing and voting upon the standard form agreements.

The first question assumes that discussions and voting with respect to both the standard form lease and standard form water service agreements will occur. It would be speculative to attempt to posit when or how often such Board actions might occur. However, it should be noted that setting of prices for irrigated water occurs annually, as does the setting of area improvement fees for lessees. Other discussions and voting with regard to standard form agreements will occur as needed within the discretion of the Board. Therefore, this Advisory Opinion would apply to Board Members with contracts without regard to when or how often discussions and voting may occur with respect to standard form agreements.

After the adoption of standard form agreements, the Board may face various questions relating to the administration and management of the agreements. For example, during the course of the leases, the Board may regularly be called upon to decide issues concerning the hike/bike trail at Johnson Lake, road maintenance, and mowing of common areas. Similarly, with respect to its irrigation customers, the Board may need to consider new uses of water from Lake McConaughy, including whether to contract with the State, Natural Resources Districts, the Platte River Recovery and Implementation Program, and others.

These administrative issues, occurring after the adoption of standard form agreements, fall outside the scope of the questions posed by the Requester, above. However, it may be noted that typically, such management issues may not involve financial gain or detriment, and the individual lessee or irrigator with a water service agreement, would be able to participate in decisions concerning such matters. To the extent that any such issues may involve financial gain or detriment, the lessee may file a potential conflict of interest statement to resolve such an issue.

Conclusion with Respect to Question 1: The answer to the first question is “No.” While Board Members without leases or water service agreements may participate in discussion and voting with respect to such agreements, those Board Members with such agreements may not. This would include Board Members with existing or prospective leases who should abstain from discussing or voting upon standard form leases. Similarly, Board Members with existing or prospective water service agreements should abstain from discussing or voting upon standard form water service agreements.

Analysis Concerning Question 2: The second question asks whether the effects of Board Member actions or decisions concerning the standard form leases or the standard form water service agreements are distinguishable from the effects of such decisions on the public generally or a broad segment of the public. If they are not distinguishable, then the said actions or decisions would be excepted from the requirements of Section 49-1499.03(1). However, if they are distinguishable, the requirements of that Section would apply.

In addressing this question, we first note that within the five counties in which Central provides irrigation water, the population totaled approximately 76,607 in 2017. The total number of Central's irrigation users within those five counties is currently approximately 700, or slightly less than 1% of the general public.

Similarly, the number of Central's lake property lessees is currently approximately 800. In the four counties (Keith, Lincoln, Dawson, and Gosper) in which Central has leased properties, the population was 69,089 in 2017. The total number of leaseholds as compared to the general population of the counties in which they are held, is slightly more than 1%.

In assessing whether actions or decisions affect the public generally or a broad segment thereof, the Commission has compared the number of individuals directly affected by certain actions or decisions with the number of persons in the public in that same area. Based upon the foregoing figures, the effects of Central's Board actions or decisions made with respect to either Central's irrigators or leaseholders, respectively, affect approximately 1% of the public. Therefore, said actions or decisions appear clearly distinguishable from the effects of such actions on the public generally or a broad segment of the public.

In NADC Advisory Opinion 144, the Commission considered the question of whether the approximately 800 entities which held liquor licenses in Omaha, Nebraska, constituted the general public or a board segment of it. At the time of the Advisory Opinion, the population of Omaha was approximately 335,000. After reviewing the number of entities holding liquor licenses as compared to the population of the City as a whole, the Commission concluded: “Given these figures, we do not believe that the liquor license holders in Omaha constitute the general public or a broad segment of it.”

In a recent case before the Commission, a Respondent public official owned seven (7) parcels of property in an area of Waverly, Nebraska which had been designated pursuant to Nebraska state law as a redevelopment area. The Hearing Officer considered the question of whether the Respondent would receive financial benefits from being in the redevelopment area which were distinguishable from those received by the public in Waverly as a whole or a broad segment thereof. In addressing this question, the Hearing Officer noted that there were a total of 81 residential units in the redevelopment area, but that the total number of residential units in Waverly as a whole was 1,215. The Hearing Officer concluded:

“..an increase in the value of his [Respondent’s] property and/or the income it generates is a reasonably foreseeable financial benefit to [Respondent] that is distinguishable from the benefits redevelopment will have for the general public or a broad swath thereof.” (See, “Recommended Findings of Fact and Conclusions of Law,” In re Hestermann, NADC Cases #15-31 and #15-32, pp. 4-5, February 12, 2018).

Conclusion with Respect to Question 2: The answer to Question 2 is “Yes.” Based upon the foregoing analysis, the effects of decisions by Central’s Board Members affecting standard form residential leases or water service agreements are distinguishable from the effects of such decisions on the general public or a broad segment thereof

Summary: Central’s Board Members without contracts with Central (leases or water service agreements) may participate in discussions and vote on all issues relative to Central’s standard form leases and standard form water service agreements. However, Board Members who have present or prospective leases may not participate in discussions and voting on standard form leases, and Board Members who have present or prospective water service agreements with the District may not participate in discussions and voting on standard form water service agreements.

Actions and decisions by Central Board Members with respect to standard form leases and standard form water service agreements are distinguishable from the effects of such actions on the public generally or a broad segment of the public. Therefore, those actions and decisions would be subject to the requirements of Section 49-1499.03(1) of the NPADA.

ADOPTED as an Advisory Opinion pursuant to Section 49-14,123(10) R.R.S 2018 and Title 4, Chapter 1, Rules of Practice and Procedure. As provided in Section 49-14,123(10), this Advisory Opinion shall be binding upon the Commission unless amended or revoked, concerning the person or public body who requested the opinion and acted in reliance thereon in good faith unless material facts were omitted or misstated by the person in the request for the opinion.

DATED this 13th day of September, 2019

NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION


Matthew Enenbach, Chairman